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Matang Plastik & Metal Work Industries Sdn Bhd & Ors v Daimler Chrysler (M) Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–1438–06 OF 2012
ABDUL MALIK ISHAK, LINTON ALBERT AND UMI KALTHUM JJCA
16 JUNE 2014

Civil Procedure — Appeal — Appeal against judgment of High Court — Appellant bought car from respondents under representation and guarantee that car was most luxurious, high quality, safest and best car on market — Car caught fire while being driven — Claim in the High Court — Whether res ipsa loquitur applicable — Whether fraud, fraudulent misrepresentation or misrepresentation proved — Claim dismissed by High Court — Appeal to Court of Appeal — Whether High Court correct in decision — Whether car purchased with defects — Whether respondents in breach of implied guarantee under Consumer Protection Act 1999

The first appellant bought a Mercedes Benz ('the car') from the respondents with the total purchase price of RM536,364. The second appellant was a director of the first appellant while the first respondent was the sole authorised importer and distributor of Mercedes Benz cars in Malaysia. The second and third respondents were dealers appointed by the first respondent for the sale of Mercedes Benz cars in Malaysia. The first appellant alleged that it bought the car on the representations and guarantee from the respondents that the car was the most luxurious, high quality, safest and the best car on the market. The car was routinely serviced at the service centre appointed by the respondents, which was, at the second respondent's workshop, within the nine months of usage in accordance with the respondents' requirements and standard procedures. While the second appellant was driving the car, there was a smell of smoke coming out from the air-conditioning ventilation of the car. The second appellant immediately stopped the car and opened the front bonnet, checked the possible cause of the smoke but was not able to find any possible cause. After a while, more smoke was coming out from the ventilation of the air-conditioning system, and proceeded to fill the whole cabin of the car. The car then caught fire and was extensively burnt within 30 minutes. In the High Court, the appellants claimed that they had suffered hardship, losses and damages due to the negligence of the respondents, including but not limited to the loss of the car, the loss of use of the car until to date, loss of reputation and business, general and special damages. The appellants also claimed exemplary damages, aggravated damages, and damages due to the breach of implied guarantees, undertaking and also misrepresentation to the appellants, especially the first and second appellants. The respondents in their defence

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claimed that the car was sold to the appellants as a used car on a 'as is, where is basis'. It was the respondents' position that at the time the car was purchased by the first appellant, the car was of merchantable quality and fit for its purpose. As the appellants had been using the car for approximately nine months and had full control and management of the car, therefore the principle of res ipsa loquitur did not apply in this case. The trial judge dealt with two main issues, namely whether res ipsa loquitur was applicable; and whether there was fraud, fraudulent misrepresentation or misrepresentation proved. The trial judge found that the doctrine did not apply to this case. For the second issue, the trial judge decided that the appellants had failed to prove that there were express representation made by the respondents that the car was a 'luxury, high quality, safest and best vehicle on the market'. In the present appeal, the appellants submitted that the car was purchased by them with defects and was at all material times unsafe and not of acceptable quality and not roadworthy; and that the respondents were in breach of the implied guarantee as provided in the Consumer Protection Act 1999 ('Act'), in particular the guarantee as to acceptable quality of the car.

Held, allowing the appeal:

(1) The doctrine of res ipsa loquitur did not apply to this case. The fact that the car was only sent to the service centre which was authorised by the respondents did not detract from the fact that, other than those trips to the service centre, the car was at all times after its delivery to the first appellant under the sole management and control of the appellants. The appellants sought to raise res ipsa loquitur against all the respondents, who were not in law responsible for each other. The appellants could not show how all the three respondents were liable under that doctrine, other than to generally state that the first respondent was the sole authorised importer and distributor of Mercedes Benz cars in Malaysia, the second and third respondents were dealers appointed by the first respondent for the sale of Mercedes Benz cars in Malaysia (see para 14).

(2) The trial judge had failed to appreciate the fact that the first appellant, through the second appellant, had bought the car on the representation of the second respondent's representative by the name of Yeow Boon Koong ('Yeow'). The representation by Yeow had motivated the first appellant through the second appellant to purchase the car for the sum of RM536,364, which amount was a substantial amount seeing that the car was a second hand car, if not for the fact of the representation having been made (see paras 24, 32(a) & (b)).

(3) Even though the appellants had used the car for a total mileage of 6,929km for a period of seven months, which did not constitute an excessive usage, that in itself did not prove that the car was of merchantable quality and fit for the purpose of its use when on reaching

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its ten month of purchase the car by itself caught fire and was almost totally destroyed. This fact was lost on trial judge when he had found the car to be of merchantable quality, contrary to the fact of the near total destruction of the car and the guarantee statutorily provided for under s 32(2)(a) of the Act as well as the representations made by Yeow (see para 32(e)).

[Bahasa Malaysia summary

Perayu pertama membeli kereta Mercedes Benz ('kereta') daripada responden-responden dengan harga belian penuh RM536,364. Perayu kedua adalah pengarah perayu pertama sementara responden pertama adalah pengimport dan pengedar tunggal yang berdaftar untuk kereta Mercedes Benz di Malaysia. Responden-responden kedua dan ketiga adalah peniaga yang dilantik oleh responden pertama untuk jualan kereta-kereta Mercedes Benz di Malaysia. Perayu pertama mendakwa bahawa ia membeli kereta atas representasi dan jaminan daripada responden-responden bahawa kereta tersebut adalah yang paling mewah, berkualiti, selamat dan kereta terbaik di pasaran. Kereta diservis secara rutin di pusat servis yang dilantik oleh responden-responden, yang mana adalah bengkel responden kedua, dalam masa sembilan bulan penggunaan mengikut kehendak dan prosedur standard responden-responden. Semasa perayu kedua memandu kereta, terdapat bau asap keluar daripada pengalihan udara penghawa dingin kereta tersebut. Perayu kedua serta merta menghentikan kereta dan membuka bonet hadapan, memeriksa punca kemungkinan asap tetapi tidak dapat menjumpai apa-apa punca kemungkinan. Selepas beberapa ketika, banyak lagi asap keluar daripada pengalihan udara sistem penghawa dingin tersebut, dan terus mengisi ruang kabin kereta tersebut. Kereta kemudiannya terbakar dan dalam tempoh 30 minit terbakar secara keseluruhan. Di Mahkamah Tinggi perayu-perayu mendakwa bahawa mereka mengalami kesusahan, kerugian dan ganti rugi akibat kecuaian responden-responden, termasuk bukan saja terhad kepada kehilangan kereta, kerugian penggunaan kereta sehingga sekarang, kerugian reputasi dan perniagaan, ganti rugi am dan khas. Perayu-perayu juga menuntut ganti rugi teladan, ganti rugi tambahan, dan ganti rugi akibat kemungkiran jaminan tersirat, akujanji dan juga salah nyata kepada perayu-perayu, terutamanya perayu-perayu pertama dan kedua. Responden-responden dalam pembelaan mereka mendakwa bahawa kereta dijual kepada perayu-perayu sebagai kereta terpakai atas 'as is, where is basis'. Adalah kedudukan responden-responden bahawa pada masa kereta dibeli oleh perayu pertama, kereta tersebut mempunyai kualiti boleh dagang dan sesuai untuk tujuannya. Memandangkan perayu-perayu telah menggunakan kereta tersebut lebih kurang sembilan bulan dan mempunyai kawalan penuh dan pengurusan kereta tersebut, oleh itu prinsip *res ipsa loquitur* tidak diguna pakai dalam kes ini. Hakim perbicaraan mempertimbangkan dua isu utama, iaitu sama ada *res ipsa loquitur* diguna pakai; dan sama ada terdapat fraud, salah nyata palsu atau misrepresentasi dibuktikan. Hakim perbicaraan mendapati bahawa doktrin

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tidak diguna pakai kepada kes ini. Untuk isu kedua, hakim perbicaraan memutuskan bahawa perayu-perayu gagal untuk membuktikan bahawa terdapat representasi nyata yang dibuat oleh responden-responden bahawa kereta tersebut adalah 'luxury, high quality, safest and best vehicle on the market'. Dalam rayuan ini, perayu-perayu berhujah bahawa kereta dibeli oleh mereka dengan kualiti yang tidak boleh diterima dan dalam keadaan cacat dan pada kesemua masa material tidak selamat dan tidak layak dipandu di jalanraya; dan bahawa responden-responden memungkiri jaminan tersirat seperti yang diperuntukkan dalam Akta Perlindungan Pengguna 1999 ('Akta'), terutamanya jaminan terhadap kualiti yang boleh diterima terhadap kereta.

Diputuskan, membenarkan rayuan:

(1) Doktrin *res ipsa loquitur* tidak digunapakai kepada kes ini. Fakta bahawa kereta hanya dihantar kepada pusat servis yang dibenarkan oleh responden-responden tidak mengurangkan daripada fakta, selain daripada perjalanan ke pusat servis, kereta pada kesemua masa selepas penghantarannya kepada perayu pertama di bawah pengurusan dan kawalan tunggal perayu-perayu. Perayu-perayu memohon untuk membangkitkan *res ipsa loquitur* terhadap kesemua responden-responden, yang dari segi undang-undang tidak bertanggungjawab untuk satu sama lain. Perayu-perayu tidak dapat menunjukkan bagaimana kesemua ketiga-tiga responden bertanggungjawab di bawah doktrin, selain daripada menyatakan secara am bahawa responden pertama adalah pengimport dan pengedar tunggal kereta-kereta Mercedes Benz di Malaysia, responden-responden kedua dan ketiga adalah peniaga yang dilantik oleh responden pertama untuk jualan kereta-kereta Mercedes Benz di Malaysia (lihat perenggan 14).

(2) Hakim perbicaraan gagal untuk menilai fakta bahawa perayu pertama, melalui perayu kedua, telah membeli kereta atas representasi wakil responden kedua yang bernama Yeow Boon Koong ('Yeow'). Representasi oleh Yeow telah mendorong perayu pertama melalui perayu kedua untuk membeli kereta tersebut untuk sejumlah RM536,364, yang mana jumlahnya adalah jumlah substansial memandangkan kereta tersebut adalah kereta terpakai, jika bukan kepada fakta representasi dibuat (lihat perenggan 24, 32(a) & (b)).

(3) Walaupun perayu-perayu telah menggunakan kereta tersebut untuk keseluruhan perbatuan sebanyak 6,929km untuk tempoh tujuh bulan, yang mana tidak membentuk penggunaan berlebihan, itu dengan sendirinya tidak membuktikan bahawa kereta tersebut adalah berkualiti dagangan dan sesuai untuk tujuannya apabila ia mencapai sepuluh bulan pembelian kereta dengan sendirinya terbakar dan hampir musnah keseluruhannya. Fakta ini tidak dinilai oleh hakim perbicaraan apabila beliau mendapati kereta tersebut mempunyai kualiti boleh dagang,

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bertentangan kepada fakta kemusnahan keseluruhan kereta tersebut dan jaminan yang secara statutori yang diperuntukkan di bawah s 32(2)(a) Akta dan juga representasi yang dibuat oleh Yeow (lihat perenggan 32(e)).]

Notes

For cases on appeal against judgment of High Court, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 871–879.

Cases referred to

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd [2012] 1 MLJ 27, CA (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113, SC (refd)

Legislation referred to

Consumer Protection Act 1999 s 32, 32(1) , (2)(a)

Evidence Act 1950 s 114 (g)

Appeal from: Civil Suit No 22–719 of 2006 (High Court, Pulau Pinang)

T Manoharan (Reza Natasha with him) (Ong & Partners) for the appellants.

Muralee Nair (V Anilraj with him) (Shearn Delamore & Co) for the first respondent.

David Lingam (Sandeep Dhaliwal with him) (David Linggam & Co) for the second and third respondents.

Umi Kalthum JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the High Court after full trial where the learned trial judge dismissed the appellants' claim for loss of use of a Mercedes Benz car model 350-L-V200 No WMK 7337 ('the car') and damages with costs of RM35,000 to the first defendant/first respondent and RM35,000 to the second and third defendants/respondents.

[2] After giving due consideration to the respective submissions by the appellants and the respondents, we unanimously allowed the appeal with costs of RM100,000 here and below. We set aside the decision of the High Court and made an order that damages be assessed by the Senior Assistant Registrar of the High Court of Penang, and the deposit be refunded to the appellants. We now give our reasons.

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A BACKGROUND FACTS

[3] The first appellant bought the car from the respondents on 8 September 2005 with the total purchase price of RM536,364. The second appellant is a director of the first appellant.

B

[4] At all material times, the first respondent is the sole authorised importer and distributor of Mercedes Benz cars in Malaysia and the second and third respondents are dealers appointed by the first respondent for the sale of Mercedes Benz cars in Malaysia.

C

[5] The car was delivered to the first appellant on 1 October 2005. The first appellant alleged that it bought the car on the representations and guarantee from the respondents that the car was the most luxurious, high quality, safest and the best car on the market.

D

[6] The car was routinely serviced at the service centre appointed by the respondents, that is, at the second respondent's workshop, within the nine months of usage in accordance with the respondents' requirements and standard procedures. The car was not modified in any manner, or serviced at any other place, save and except in the authorised workshop of the respondents. The car was maintained in its original condition without any modification and was kept under proper maintenance as required under the standard manual of the respondents.

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F

[7] On 1 July 2006 at about 4pm while the second appellant was driving the car on the Penang Bridge, the third appellant was a passenger of the car at the time, when suddenly there was a smell of smoke coming out from the air conditioning ventilation of the car. The second appellant immediately stopped the car and opened the front bonnet, checked the possible cause of the smoke, but he was not able to find any possible cause. After a while, the second and third appellants noticed more smoke was coming out from the ventilation of the air conditioning system, and proceeded to fill the whole cabin of the car. The second and third appellants ran away when the car caught fire and the car was extensively burnt within 30 minutes. The car was then towed back to the store of the second respondent in Ipoh on the same day.

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[8] The appellants claimed that they had suffered hardship, losses and damages due to the negligence of the respondents, including but not limited to the loss of the car, the loss of use of the car until to date, loss of reputation and business, general and special damages. The appellants also claimed exemplary damages, aggravated damages, and damages due to the breach of implied guarantees, undertaking and also misrepresentation to the appellants, especially the first and second appellants.

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[9] The respondents in their defence claimed that the car was sold to the appellants as a used car on a 'as is, where is basis'. The car was tested by Puspakom and certified to be in road worthy condition. It was the respondents' position that at the time the car was purchased by the first appellant, the car was of merchantable quality and fit for its purpose. As the appellants had been using the car for approximately nine months and had full control and management of the car, therefore the principle of *res ipsa loquitur* did not apply in this case.

THE HIGH COURT DECISION

[10] The learned trial judge dealt with two main issues as follows:

(a) *res ipsa loquitur* — whether applicable? and

(b) was fraud, fraudulent misrepresentation or misrepresentation proved?

[11] On the issue of *res ipsa loquitur*, the learned judge found that this doctrine did not apply to this case. He reasoned as follows:

> It was in the evidence that except for the time when the said car was brought in for service, at all time the sole management and control of the car was with the plaintiffs.
>
> The plaintiffs must show that there was no other explanation for the incident than the negligence of the defendants.
>
> The plaintiffs through PW3 and PW4 tried to establish that the fire had been caused by an electrical short circuit. In such a case the application of *res ipsa loquitur* is inappropriate, for the question of the defendants' negligence must be determined on such evidence.
>
> For the doctrine of *res ipsa loquitur* to apply there must be no evidence as to how or why the car caught fire. However DW1, the senior engineer of Daimler AG responsible for vehicular fire and accident in his report and via his evidence led in court explained the plausible causes for how the fire could have started, which was not legitimately challenged by the plaintiffs.
>
> In conclusion, I would say the doctrine of *res ipsa loquitur* does not apply to this case.
>
> Evidence led by PW3 and PW4 was to purportedly show that the car caught fire due to electrical short circuit but under cross-examination they admitted that unable to positively determine it.

[12] For the second issue, the learned trial judge decided that the appellants had failed to prove that there were express representation made by the respondents that the car was a 'luxury, high quality, safest and best vehicle on the market'.

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A DECISION

Res ispa loquitur

B **[13]** The established doctrine of *res ipsa loquitor* has been propounded in *Clerk & Lindsell on Torts*, (18th Ed), paras 7-192–7-196. It states as follows:

> *Doctrine of res ipsa loquitur* A further circumstance in which the court may infer carelessness on the part of the defendant is where the claimant can show that the nature of the accident suggests both negligence and the defendant's responsibility.
C Drawing the inference in such a circumstance is often described as an application of the doctrine of *res ipsa loquitur*. However, it is important to note that this label represents a rule of evidence and states no principle of law. As Morris LJ said 'This convenient and succinct formula possesses no magic qualities: nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin'. It is only
D a convenient label to apply to a set of circumstances in which a claimant proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. The doctrine which stems from the judgment of Erle CJ in *Scot v London and St Katherine Docks*, applies where:
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> (1) the occurrence is such that it would not have happened without negligence; and
>
> (2) the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or
F whom he has a right to control;
>
> (3) there is no evidence as to why or how the occurrence took-place; if there is such evidence, then appeal to *res ipsa loquitur* is inappropriate for the question of the defendant's negligence must be determined on such evidence.

G

[14] Based on the doctrine as expounded, we agreed with the finding of the learned High Court judge that the doctrine of *res ipsa loquitur* did not apply to this case for the reasons he had stated and referred to above. The fact that the car was only sent to the service centre which was authorised by the respondents did
H not detract from the fact that, other than those trips to the service centre, the car was at all times after its delivery to the first appellant on 1 October 2005 under the sole management and control of the appellants. We agree with the first respondent's submission that the appellants, by stating that their experts could trace the cause of the fire to a short circuit or electronic malfunction, had
I removed any basis for the application of the said doctrine. Moreover, the appellants sought to raise *res ipsa loquitur* against all the respondents, who are not in law responsible for each other. The appellants could not show how all the three respondents were liable under that doctrine, other than to generally state that the first respondent is the sole authorised importer and distributor of

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Mercedes Benz cars in Malaysia, the second and third respondents are dealers appointed by the first respondent for the sale of Mercedes Benz cars in Malaysia.

[15] Even though we had found that the doctrine of *res ipsa loquitur* did not apply to the facts of this case, that was not the end of the matter. We had proceeded to deal with the second issue of whether there was fraud, fraudulent misrepresentation or misrepresentation by the respondents against the appellants.

Whether fraud, fraudulent misrepresentation, misrepresentation proved

[16] In his grounds of judgment, the learned trial judge found that the appellants led no evidence at all to prove that any fraud, fraudulent misrepresentation or misrepresentation had been committed by the respondents against them that the car was the luxury, high quality and safest, best vehicle in the market. Instead there was evidence (of 'SD3') that showed the car had by 17 April 2006 accumulated a total mileage of 17,099km of which 6,929km was by way of the appellants' usage over a period of seven months. By averaging previous use of the car by the appellants, it was very possible that the car could have accumulated a further 2,000km mileage by way of the appellants' usage by the time the fire incident occurred. The learned judge agreed with the submissions of the second and third respondents that this showed the car had been extensively used by the appellants. It also showed that the car was of merchantable quality, fit for use and thereby roadworthy. The learned judge also found that the appellants gave no evidence that express representation were made by the respondents that the car was 'luxury, high quality and safest, best vehicle on the market'.

[17] Before us, the appellants submitted that the car was purchased by them with defects and was at all material times unsafe and not of acceptable quality and not roadworthy. Reference was made to s 32 of the Consumer Protection Act 1999 ('Consumer Protection Act'), which states (in particular) as follows:

> Implied guarantee as to acceptable quality
>
> 32(1) Where goods are supplied to a consumer there shall be implied a guarantee that the goods are of acceptable quality.
>
> (2) For the purposes of subs (1), goods shall be deemed to be of acceptable quality:
>
> (a) if they are:
>
> (i) fit for all the purpose for which goods of the type in question are commonly supplied;
>
> (ii) acceptable in appearance and finish;

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(iii) free from minor defects;

(iv) safe; and

(v) durable; and

(b) a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard the goods as acceptable having regard to:

(i) the nature of the goods;

(ii) the price;

(iii) any statements made about the goods on any packaging or label on the goods;

(iv) any representation made about the goods by the supplier or the manufacturer; and

(v) all other relevant circumstances of the supply of the goods.

[18] It was submitted that the respondents were in breach of the implied guarantee as provided in the Consumer Protection Act, in particular the guarantee as to acceptable quality of the car. Emphasis was made to the fact that before the fire incident, the car suffered four break downs since its delivery to the first appellant and followed by the fire incident. The Court of Appeal decision in *Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd* [2012] 1 MLJ 27 was referred to, which also involved a motorcar of similar make, where this court allowed a summary judgment and (in the headnotes) held as follows:

> (1) When the Benz car could not start there was a breach of the implied conditions or guarantees which rendered the Benz car not to be of satisfactory or acceptable quality and unfit for its purpose. Based on the numerous fundamental problems encountered by the plaintiff it was found that the Benz car was not in fact and in law of an acceptable quality within the provisions of the (Consumer Protection Act). The facts were clear and undisputed and there were no triable issues. Under s 12(2) of the (Sale of Goods Act) the breach of a condition gives the plaintiff the right to treat the contract as repudiated. It was thus held that the plaintiff was entitled to reject the Benz car, which it did when it left it in the first defendant's workshop on 21 May 2007.

[19] The appellants referred to the evidence of Mr Sarveswaran a/l Rajasegaran ('SD3'), who is the principal dealer of the second respondent, where he testified that on the second day after the delivery of the car, that is on 3 October 2005, the car had broken down, and, amongst others, there was a problem with the air conditioning unit. During cross-examination, SD3 stated that there was ESP warning light problem which is a brake system program controlled by electronics (p 12, RRT). SD3 testified that altogether the car was

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sent back to the second respondent for 'repairs' five times in ten months since it was delivered to the first appellant before the fire incident. There was air conditioning problem in the car.

[20] The appellants then submitted that the evidence tendered through the first respondent's witness, Mr Lothar Ralf Schusdzarra ('SD1'), should not be accepted by this court as good evidence and that this court should not give weight to his evidence. This was because SD1 had given his evidence based on a letter dated 12 September 2006 (p 304, RR, *Jilid* 3) to the effect that the car caught fire due to combustible materials picked up while being driven. This letter was not an expert report and had not been signed by SD1. This letter was signed by the senior manager and senior executive of the first respondent who are not experts nor did they have any experience in investigating fire incidents. Yet, the respondents and the learned trial judge had relied on this letter as a sole evidence to dismiss the appellants' claim. It was submitted that the learned judge had totally misdirected himself and this court was called upon to intervene in the matter. Moreover, SD1, it was argued:

(a) has no certificate in fire investigation as compared to Mr Poon Poh Wong ('SP4');

(b) has no experience in investigating any vehicle caught in fire due to external object nor had there been any finding that a car caught fire due to external objects in his past experience of investigation. He testified that this was the first time he had made such a finding;

(c) has done only about five fire incident investigations on this type of vehicle which showed that SD1 is inexperienced in fire investigation;

(d) is the employee of the first respondent since 1980 and has been working for the first respondent for the past 32 years. As such he was clearly unable to provide any independent assistance to the court;

(e) is not an independent expert witness;

(f) admitted that he did not tender his report in court and did not know why this was so. That being the case, it was submitted that s 114 (g) of the Evidence Act 1950 ('Evidence Act') should be invoked against the respondents, as, if SD1's respondent had been tendered in court it would be unfavourable to the first respondent. However, the learned trial judge had failed to invoke the adverse inference against the respondents;

(g) admitted that it was very unlikely/very rare for an external object to be trapped in the undercarriage of the car (pp 5–6, RRT) and was not sure what would be the external object, if any, that was trapped in the undercarriage; and

(h) did not have any real/physical evidence of the existence of the external object. Therefore the first respondent had failed to prove there were

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external objects which had caused the fire, and SD1's opinion on the cause of the fire due to external objects should have been ruled out and the appellants' claim should have been allowed.

[21] As compared to the respondents' evidence, the appellants had called two independent expert witnesses, that is, SP3 and SP4.

[22] SP3, Mr Amar Singh, a retired senior chemist and Director of Department of Chemistry Malaysia, in his report which was undated (pp 342–343 RR, *Jilid 3*) concluded that:

> Findings
>
> ... Further from the documents shown to me, the information gathered from the owner Mr. Yew Tuan Leong and from my examination, *I am of the opinion that the seat of the fire was most probably at the rear of the car.*
>
> Conclusion
>
> *Due to extensive fire-damage to the car, I was unable to determine the cause of the fire. However, the origin of the fire due to an electrical short-circuit cannot be ruled out.* If a short-circuit develops, the current will be high enough to allow kindling of a fire provided there is flammable or combustible material available at the point of heating, such shorts will cause smoking or even flaming of insulation at times. If the wires where the short-circuit occurred have completely melted away, it is not possible to locate evidence of a short-circuit.
>
> It is to be noted that the car had been running on the highway for about one hour without any problem.
>
> *The cause of the fire being due to an external source such as some external material being trapped at the exhaust and eventually starting the fire or some rags or towels being left in the engine compartment is very remote.*
>
> (Emphasis added.)

[23] SP4 is the consultant engineer of Forensic Services (M) Sdn Bhd for 14 years. His qualifications are:

(a) BSc in Mechanical Engineering — 1983 West Virginia University, USA;

(b) BA Geography — 1986 West Virginia University, USA;

(c) Certified Fire and Explosion Investigator (CFEI-2006); and

(d) Certified Visual Welding Inspector (CSWIP) — 2008.

In his report (pp 375–377, RR, *Jilid 3*) SP4 stated as follows:

> 6.1 Fire Origin

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Smoke in the cabin would be recirculated into the cabin. If there was a fire under the dashboard and smoke would get into the air ducting, fresh smoke would be blown into the cabin as witnessed by Mr. Yew (3rd Appellant). It was difficult to believe that there could be a fire anywhere else in the cabin other than under the dashboard. If the fire was anywhere else, one of the two people in the car would surely see it. Therefore the most likely fire origin was under the dashboard.

...

6.2.3 Combustible material picked up while driving

...

Our examination of other similar make vehicles and interview of the driver revealed the following.

1st	The exhaust pipe system on the underside of similar make vehicles had no protruded parts to trap debris.
2nd	A fire that originate from the exhaust pipe system would have ignited combustible material adjacent to it. The driver had indicated that he did not see any sign of burning when he checked the underside of the vehicle.

The evidence in total indicates that combustible material was not picked up and ignited at the exhaust pipe system.

...

7 CONCLUSION

The investigation into a vehicle fire involving a Mercedes Benz S350L with registration No WMK 7337 *revealed that it was most likely that the fire had originated from the cabin and the cause was an electrical malfunction.*

(Emphasis added.)

[24] The evidence of SP3 and SP4 mutually corroborated with that of the second appellant ('SP1') and the third appellant ('SP2') on there being no fire at the undercarriage of the car as claimed by the respondents. As alluded to before this, the second appellant noticed smoke coming out from the air conditioning ventilation. He had checked the front bonnet and undercarriage and found neither fire nor smoke at these places. Subsequently the fire burnt the car. It was, therefore, submitted by the appellants that the only possible conclusion that could be arrived at was that the fire occurred due to the electrical short circuit as the smoke was first seen coming out from the air conditioning ventilation of the car, which was under the dashboard of the car. The learned trial judge had failed to appreciate the evidence of SP3 and SP4 and had misdirected himself when he accepted the testimony of SD1.

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[25] As the second and third respondents had adopted the submission of the first respondent in its entirety, we considered the submissions of the first respondent as representing all the respondents.

[26] It was the submission of the respondents that the trial judge had correctly adopted the report of SD1 as the evidence of SP3 and SP4 was wholly unreliable and riddled with inconsistencies in that:

(a) SP3's investigation on the car was carried out more than a year after the fire occurred;

(b) SP3's report was premised on what was told to him by SP1 and SP2;

(c) SP3 admitted in cross-examination that he could not obtain any evidence of short circuit in the car and admitted he could not ascertain the cause of the fire;

(d) yet, despite not knowing the cause of the fire, SP3 concluded that the fire in the car was caused by an electrical short circuit merely on the basis that the possibility of electrical short circuit could not be ruled out;

(e) the evidence of SP4 was far more improbable as he only carried out the investigation on the car some four years after the fire to the car. Given the length of time had lapsed and the fact that evidence left behind in a burnt vehicle was necessarily very fragile, at the time that SP4 looked at the car, the evidence would have been thoroughly degraded;

(f) despite only examining pictures provided and the wreckage of the car, SP4 concluded that the likely cause of the fire was due to electrical malfunction and the fire originated from under the dashboard without offering any evidence to support such a conclusion;

(g) contrary to SP4's findings, SP3's opinion was that the source of the fire was most probably at the rear of the car; and

(h) both SP3 and SP4 did not challenge the findings made by SD1.

[27] In contrast to SP3's and SP4 evidence it was submitted that SD1 had offered conclusive evidence of the cause of the fire and had successfully rebutted the evidence of SP3 and SP4. A summary of the key points of SD1's evidence are listed below:

(a) SD1 carried out his investigation on the car less than two months from the date of the said incident on 17 August 2006;

(b) SD1 has extensive knowledge and training in vehicular fire and accident investigations and had investigated over 100 vehicular fire related incidents out of which five were of a similar make and model of the car;

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(c) SD1 had identified five possible fire ignition sources in his report namely engine malfunction, electrical short circuit, fuel or oil leak, combustible materials improperly left behind in the engine compartment and combustible materials picked up while driving (witness statement of SD1, p 109, Q & A 12, RR *Jilid* 2);

(d) upon a detailed explanation of each possible cause of ignition (including electrical short circuits) and by way of a process of elimination, SD1 formed his opinion that the fire was more likely than not caused by some external material trapped at the exhaust that eventually caused the fire (witness statement of SD1, Q & As 13–14, pp 109–115, RR *Jilid* 2);

(e) the finding of SD1 that the smouldering of the external material trapped at the exhaust which may have affected the rubber seals causing smoke to enter the air conditioning of the car was corroborated by the evidence of SP1 and SP2 who testified that they had first noticed smoke coming out of the ventilation outlets at the dashboard and that there was no smoke when SP2 opened the bonnet. It also corroborated SP1's evidence that the appellants did not experience any engine problem and did not notice any warning lamp in the car prior to the incident; and

(f) SD1 had also analysed the findings of SP3 and SP4 and had successfully rebutted their purported evidence.

[28] With regard to the question of the expertise and independence of SD1, it was submitted that these aspects along with the evaluation of the evidence of SP3, SP4 and SD1 were factual matters determined by the learned trial judge having had the benefit of viewing the documents and having seen and heard the witnesses and their demeanour. Unless there had been a misdirection by the learned trial judge or that his decision was plainly wrong, it was submitted that this court in its appellate capacity ought not to interfere with the said findings of facts. Reference was made to *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113 (SC); and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC).

[29] It was also submitted that the fact that the car was sent to the second respondent's workshop throughout the period form the delivery of the car to the first appellant until the date of the fire incident did not detract from the fact that the appellants, save for those five times the car was sent to the workshop, had full control and management of the car. Moreover, the car had accumulated a total mileage of 17,099km of which 6,929km was by way of the appellants' usage over a period of seven months when it was brought in for regular service on 17 April 2006, about 2 1/2 months before the incident.

[30] As for the car being of not merchantable quality and purported guarantee by the respondents that the car was safe, of good quality and

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luxurious, it was argued that the appellants had been using the car regularly and for a mileage of 6,929km for over a period of seven months. This showed that the appellants' contention that the car was not of merchantable quality was unfounded.

[31] With regard to the appellants' submission that adverse inference under s 114(g) of the Evidence Act 1950 be invoked on the non-production of the expert report of SD1, it was submitted for the respondents that SD2 had sufficiently explained the reason why the so-called the expert report of SD1 at pp 304–327, *Jilid* 3, RR was reduced into letter; the reason being that it is the first respondent's company standard procedure to issue a document on its letterhead as the request was made by a customer. In fact, in the second paragraph of the letter on p 304, *Jilid* 3, RR it was clearly stated that a technical expert had been commissioned to inspect the car and the letter 'set out the expert's report on his investigation for your reference ...'. This letter containing the report and the photographs taken by SD1 were tendered in court and marked as exh D4. SD1 and SD2 had, moreover, confirmed in court that the document at pp 304–327, *Jilid* 3, RR was in fact the full expert report prepared by SD1 (p 10, RRT). SP4 in his own report had referred to the report of SD1, and this was acknowledged by the learned trial judge in dismissing the appellants' submission on this issue (pp 70–77, grounds of judgment, RR *Jilid* 1; pp 371–372, RR *Jilid* 3). Therefore the appellants' allegation of adverse inference was without basis and ought to be dismissed.

[32] After careful consideration of the three expert reports of SP3, SP4 and DW1 as well as their testimonies in court, we find that the learned trial judge had given insufficient judicial appreciation of the expert reports of SP3 and SP4 and other evidence produced by the appellants. The learned trial judge had instead accepted wholly the explanation on the possible cause of the fire by SD1. We find the learned trial judge had failed to appreciate the fact that:

(a) the first appellant, through the second appellant, had bought the car on the representation of the second respondent's representative by the name of Yeow Boon Koong ('Yeow') (p 74, RR *Jilid* 2, Q & A 5), where Yeow, in the words of SP1/the second appellant, had made SP1 to understand as follows:

> Saya diberitahu bahawa kereta yang Plaintif Pertama akan membeli adalah terbaru dan hasil kajian dan teknologi tinggi. Kami diberitahu kereta Mercedes adalah bermutu tinggi, selamat, mewah dan terunggul dan bebas daripada apa-apa risiko.

(b) the representation by Yeow had motivated the first appellant through the second appellant to purchase the car for the sum of RM536,364, which

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amount to our minds was a substantial amount seeing that the car was a second hand car, if not for the fact of the representation having been made;

(c) once purchased, the provisions of s 32(1) of the Consumer Protection Act applies, that is, there was an implied guarantee by the respondents, or at least the second and third respondents, that the car was of acceptable quality within the meaning of s 32(2)(a) of the same. The car to be of acceptable quality must be fit for all the purposes for which the car was bought (which was disputed), acceptable in appearance and finish (which was not disputed), free from minor defects (which was disputed), safe (which was disputed) and durable (which was disputed);

(d) on the second day after the car was delivered to the first appellant, the car was sent to the second respondent's workshop because it had broken down and had a problem with the air conditioning unit. SD3 testified that there was ESP warning light problem which is a brake system program controlled by electronics. Altogether the car was sent back to the second respondent for 'repairs' five times in ten months since it was delivered to the first appellant and before the fire incident. There was still the air conditioning problem in the car;

(e) even though the appellants had used the car for a total mileage of 6,929km for a period of seven months, which to us did not constitute an excessive usage, that in itself did not prove that the car was of merchantable quality and fit for the purpose of its use when on reaching its ten month of purchase the car by itself caught fire and was almost totally destroyed. This fact was lost on the learned trial judge when he had found the car to be of merchantable quality, contrary to the fact of the near total destruction of the car and the guarantee statutorily provided for under s 32(2)(a) of the Consumer Protection Act as well as the representations made by Yeow to SP1; and

(f) even though SP3 could not determine the cause of the fire, he however stated that the origin of the fire due to an electrical short circuit could not be ruled out. SP3 specifically stated that the cause of the fire being due to an external source such as some external material being trapped at exhaust and eventually starting the fire or some rags or towels being left in the engine compartment was very remote — meaning to say that the possible explanation given by SD1 on the cause of fire was considered by SP3 as remote. SD1 himself had admitted that it was very unlikely/very rare for an external object to be trapped in the undercarriage of the car and was not sure what would be the external object, if any, that was trapped in the undercarriage. SP4 in his report had alluded to this aspect and we would like to repeat what he said:

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Our examination of the similar make vehicles and interview revealed the following.

1st The exhaust pipe system on the underside of similar make vehicles *had no protruded parts to trap debris.*

2nd A fire that originate from the exhaust pipe system would have ignited combustible material adjacent to it. The drivers had indicated that he did not see any sign of burning when he checked the underside of the carriage.

The evidence in total indicates that combustible material was not picked up and ignited at the exhaust pipe system.

(Emphasis added.)

[33] We found, that due to his lack of appreciation of the facts referred to above, the learned trial judge had misdirected himself on the issue of misrepresentation by the respondents. This was a case where appellate intervention was called for. We found that there were sufficient evidence of misrepresentation by the respondents to the appellants and that the car was not of merchantable quality and not fit for the purpose it was bought and the respondents were in breach of s 32(2)(a) of the Consumer Protection Act. We made such findings even though we do not subscribe to the appellants' submission that s 114(g) of the Evidence Act be invoked against the report of SD1. The learned trial judge was correct when he admitted exh D4. We had therefore unanimously allowed the appeal and ordered accordingly.

Appeal allowed.

Reported by Afiq Mohamad Noor